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IN THE

# Supreme Court of the United States

October Term, 1976

No. 76-871

PRESTIGE LINCOLN-MERCURY, INC., N. GROSSMAN and H. I. GROSSMAN,

*Petitioners,*

vs.

QUALITY MERCURY, INC., FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Petitioners, Prestige Lincoln-Mercury, Inc., N. Grossman and H. I. Grossman, defendants in the District Court, appellees below, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above case on September 27, 1976.

## I.

## OPINIONS BELOW

The opinions of the District Court appear as Appendices A and B hereto, *infra*, pp. A1-A12, and are not published.

The opinion of the Court of Appeals appears as Appendix C hereto, *infra*, pp. A13-A25, and is reported at 1976-2 Trade Cases ¶61,086, — F.2d —.

## II.

## JURISDICTION

The judgment of the Court of Appeals was entered on September 27, 1976 (Appendix C, *infra*, p. A13). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## III.

## QUESTION PRESENTED

Even though *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), established that, where competitive products are readily available, vertical confinement of a manufacturer's sales of merchandise to selected dealers would not violate the Sherman Act, does a complaint nevertheless state a claim under §1 of the Sherman Act merely by alleging that a vertical exclusive franchise agreement between an automobile manufacturer and a dealer is an unreasonable restraint of trade?



## IV.

## STATUTES INVOLVED

The statute directly involved in the petition is 15 U.S.C. §1 which is set forth in Appendix D hereto, *infra*, p. A25.

## V.

## STATEMENT

### A. The Nature of the Case and Its Disposition Below.

Respondent Quality Mercury Inc. (hereinafter referred to as "Quality"), a franchised Mercury dealer,[1] commenced this action on or about October 1, 1974, against two sets of defendants: (1) Respondents Ford Motor Company and Ford Marketing Corporation (hereinafter collectively referred to as "Ford"), the manufacturer and distributor of several brands of passenger cars, including the Lincoln line of automobiles[2]; and (2) Petitioners Prestige Lincoln-Mercury, Inc., franchised as both a Lincoln and Mercury dealer,[3] and N. Grossman and H. I. Grossman, its principals (hereinafter collectively referred to as "Prestige"). Quality asserted in its complaint that Prestige and Ford had combined and conspired to restrain trade and commerce in violation of Section 1 of the Sherman Act (15 U.S.C. §1) by maintaining Prestige as the sole Lincoln dealership in the Minneapolis area and by denying Qualty a franchise to sell Lincolns.[4]

Prestige moved the trial court for judgment on the pleadings pursuant to Rule 12(c), Federal Rules of Civil

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[1]Complaint, Paragraphs 2 and 17(b), Appendix E, *infra*, pp. A28 and A32.
[2]Complaint, Paragraphs 9 and 10, Appendix E, *infra*, p. A29.
[3]Complaint, Paragraph 13, Appendix E, *infra*, pp. A30-A31.
[4]Complaint, Paragraphs 15 and 16, Appendix E, *infra*, pp. A31-A32.

Procedure, on the ground that Quality's complaint failed to state a claim upon which relief could be granted. The District Court, by memorandum decision, granted Prestige's motion.[5] Subsequently, Ford also moved the Court for judgment on the pleadings and its motion was likewise granted.[6] Quality appealed the granting of judgment on the pleadings in favor of both sets of defendants to the United States Court of Appeals for the Eighth Circuit. On September 27, 1976, that Court reversed the decision of the District Court and remanded the case for further proceedings.[7]

### B. The Relevant Facts

The District Court, after considering the complaint in the light most favorable to Quality, concluded that it did not state a claim upon which relief could be granted because, *inter alia,* the complaint failed to allege facts showing an agreement, combination or conspiracy violative of the antitrust laws. The entirety of Quality's factual allegations relating to the claimed violation of the antitrust laws is contained in Paragraphs 15, 16 and 17 of the complaint. In Paragraphs 15 and 16, Quality asserts that Ford and Prestige have violated the antitrust laws by maintaining Prestige as the sole Lincoln distributorship in the Minneapolis market with no other purpose than to insulate Prestige from intrabrand competition. (Appendix E, *infra,* pp. A31-A32. Quality alleges in Paragraph 17 that Ford and Prestige committed the following acts in furtherance of the alleged conspiracy: (1) granting Prestige the sole Lincoln dealership notwithstanding determinations by

[5]Appendix A, *infra,* p. A1.
[6]Appendix B, *infra,* p. A11.
[7]Appendix C, *infra,* p. A13.



both Ford and Prestige that there is a need for another Lincoln dealership in the Minneapolis area; (2) refusing to grant Quality a Lincoln dealership notwithstanding the policy of Ford's Lincoln-Mercury Division that its supervised dealers should sell both lines of automobiles; and (3) representing to Quality that a letter from an agent of Ford to Prestige dated April 11, 1962, is a binding contract which prevents Ford from franchising an additional Lincoln dealership in the Minneapolis area despite Ford's policy of franchising additional Lincoln dealers at sites which are more than ten miles from an existing Lincoln dealer. (Appendx E, infra, pp. A32-A33).

Nowhere in the complaint does Quality allege that any illegal ramifications, such as price fixing, have resulted from the exclusive franchise granted to Prestige, or that Mercury dealers are prohibited from selling other lines of automobiles,[8] or that there are not competitive products readily available in the market,[9] or that there was an overall scheme whereby Lincoln dealers control the Board of Directors of Ford or set criteria for marketing areas or vote on who may be accepted as new dealers, or that Prestige has combined or conspired with any other Lincoln dealer to allocate horizontally territories in which Lincolns could be sold or to exclude Quality from the Lincoln market. What Quality has pled is purely and simply a vertical exclusive franchise agreement between Ford and Prestige and nothing more.

[8]To the contrary, Quality alleges that, in addition to the Mercury line of automobiles, it also sells "a foreign-made automobile." (Complaint, Paragraph 12, Appendix E, *infra,* p. A30.
[9]To the contrary, Quality alleges that the Lincoln line of automobiles is competitive "with Cadillac and Chrysler Imperial." (Complaint, Paragraph 10, Appendix E, *infra,* p. A29.

The District Court, in concluding that Quality had failed to allege a violation of the antitrust laws, commented (Appendix A, *infra*, pp. A8-A9):

> "This Court concludes that the plaintiff has pled only an exclusive franchise agreement between Prestige and Ford of the variety found to be legal in *Schwing* [*Motor Co. v. Hudson Sales Corp.*, 138 F. Supp. 899 (D. Md. 1956), *aff'd* 239 F. 2d 176 (4th Cir. 1956), *cert. denied* 355 U.S. 823 (1957),] and *Packard* [*Motor Car Co. v. Webster Motor Car Co.*, 243 F. 2d 418 (D.C. Cir. 1957), *cert. denied* 355 U.S. 822 (1957)]. The Court also finds a close resemblance to the situation pled in plaintiff's complaint and those found to be legal in *Top-All Variety, Inc. v. Hallmark Cards, Inc.*, 301 F. Supp. 703 (S.D. N.Y. 1969) (exclusive franchise in the greeting card industry), and *Ace Beer Industries* [*sic*] *v. Kohn, Inc.*, 318 F. 2d 283 (6th Cir. 1963) (exclusive franchise in beer distribution)."

The Court of Appeals, admitting the unprecedented nature of its decision[10] and relying upon Judge Bazelon's dissent in the *Packard* case[11] and two law review articles,[12] reversed the District Court and ordered the case remanded for trial to give Quality an "opportunity to prove the unreasonableness of the restraint." (Appendix C, *infra*, p. A23).

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[10]Appendix C, *infra*, p. A22, n. 6.
[11]*Id.* at p. A20.
[12]*Id.* at p. A22, n. 6.



## VI.

## REASONS FOR GRANTING WRIT

### Permitting an Unsuccessful Applicant for an Additional Franchise in an Area to Litigate the Reasonableness of the Restraint Resulting From an Existing Vertical Exclusive Dealing Agreement Would Inundate the Federal Courts With a Flood of Cases Which Would Have the Ultimate Effect of Impairing Rather than Promoitng Competition.

#### A. The Court of Appeals Decision Involves an Important Question of Federal Law Which Should be Settled by This Court.

Franchising has become an important factor in preserving in the American marketplace the presence of the small independent merchant. As Mr. Justice Stewart noted in his separate opinion in *United States v. Arnold, Schwinn & Co., supra*, 388 U.S. at 386-87:

> "* * * [F]ranchising promises to provide the independent merchant with the means to become an efficient and effective competitor of large integrated firms. Through various forms of franchising, the manufacturer is assured qualified and effective outlets for his products, and the franchise enjoys backing in the form of know-how and financial assistance. These franchise arrangements also make significant social and economic contributions of importance to the whole society * * *.
>
> "Indiscriminate invalidation of franchising arrangements would eliminate their creative contributions to competition and force 'suppliers to abandon franchising and integrate forward to the detriment of small business. In other words, we may inadvertently

> compel concentration' by misguided zealousness. As a result, '[t]here [would be] less and less place for the independent.' *Standard Oil Co. v. United States,* 337 U.S. 293, 315, 69 S. Ct. 1051, 1062, 93 L.Ed. 1371, 1386 (separate opinion of Mr. Justice Douglas). 'The small, independent businessman [would] be supplanted by clerks.' *Id.*, at 321, 69 S. Ct. at 1067." (Footnotes omitted).

The pervasiveness of franchising in our economy is evident from the fact that in 1972 there were 445,281 franchised businesses in the United States,[13] 25,530 of which were franchised automobile dealerships.[14]

The rule adopted by the Court of Appeals has grievous implications for the common and established practices of franchising and the granting of exclusive dealerships. Under the Court of Appeals approach, by the simple device of alleging that an exclusive franchise is unreasonable in duration and/or territory, every unsuccessful applicant for a nearby franchise can bring suit against the franchisor and the existing franchisee and subject them to the substantial expense and burden of pretrial discovery and a trial on the merits. The Court of Appeals would substitute the judgment of a federal court and jury for the business judgment of the franchisor on the question of how many outlets he will have for his products and how much "elbow room" each distributor will be granted for how long a period of time. Every successful exclusive dealership would provide a tempting target for a treble damage action challenging the agreement for exclusivity, since the

[13]*GTE Sylvania Inc. v. Continental T.V., Inc.*, 537 F.2d 980, 998 n. 29 (9th Cir. 1976), *cert. granted* 45 Law Week 3299 (October 18, 1976).

[14]Schmitt, "Antitrust and Distribution Problems in Tight Oligopolies—A Case Study of the Automobile Industry," 24 Hastings L.J. 849, 882 n. 161 (1973).



success of the dealership could be argued to demonstrate the "need" for another dealer and the unreasonableness of the exclusive. Accordingly, the rule adopted by the Court of Appeals would markedly reduce the incentive for a businessman to accept a franchise and invest the money and effort necessary to develop the local market for the franchisor's products. Competition and potential competition between manufacturers would be stifled as a result.

Because of the great impact this ruling will have on a basic method of doing business in the United States, it is of utmost importance that this Court, at the pleading stage and before the floodgates are opened to a sea of litigation, consider and construe the Sherman Act to determine whether a claim is stated under Section 1 simply by the allegation that an existing vertical exclusive dealing arrangement is an unreasonable restraint.[15]

### B. The Court of Appeals Decision Conflicts With Prior Decisions by This Court and Other Courts of Appeals.

In arriving at its decision, the Court of Appeals departed from significant prior rulings of this Court and placed

[15]The flood of litigation that will inundate the federal courts if the decision of the Court of Appeals is permitted to stand is not hypothetical or imagined. The *Sylvania* court cited an "avalanche" of precedents dealing with this question. (537 F.2d at 997). Many of these cases were disposed of by the District Courts on pretrial motions to dismiss for failure to state a claim. See, *e.g., Ace beer Distributors, Inc. v. Kohn, Inc., supra; Schwing Motor Co. v. Hudson Sales Corp., supra; Top-Ali Variety, Inc. v. Hallmark Cards, Inc., supra; E. A. Weinel Construction Co. v. Mueller Co.*, 289 F.Supp. 293 (E.D.Ill. 1968). If each of these cases is required to be tried on the merits, which is the upshot of the ruling of the Court of Appeals in the case at bar, the dockets of the federal courts would be jammed with antitrust suits filed by unsuccessful franchise applicants. Before this burden is cast on the district courts, this Court should determine whether a case can proceed without alleging anything more than the claimed unreasonableness of a typical vertical exclusive franchise.

itself in conflict with rulings of other Courts of Appeals in similar cases.

The fundamental predicate for the decision in *GTE Sylvania Inc. v. Continental T.V., Inc., supra,* in which this Court granted certiorari on October 18, 1976 (45 Law Week 3299), was the established legality of the exclusive franchise. The *Sylvania* court relied on the "veritable avalanche of precedent to the effect that, absent sufficient evidence of monopolization, a manufacturer may legally grant such an exclusive franchise, even if this effects the elimination of another distributor."[16] It then reasoned (537 F. 2d at 997-8):

> "The clearly established legality of exclusive dealerships compels the conclusion that location causes cannot be *per se* illegal. If it is legal for a manufacturer to promise one dealer that he will have the exclusive right to sell the manufacturer's products within a designated territory, then obviously it is legal for that manufacturer to keep his promise of exclusivity by denying other dealers like Continental the power to sell from retail outlets at unauthorized locations within the first dealer's exclusive territory. The accepted principle that a manufacturer may legally grant an exclusive dealership is rendered meaningless if he cannot legally use a location clause to prevent his other dealers from opening their own retail outlets in the same area."

Since a "location clause" is merely a method to enforce an underlying exclusive dealing arrangement,[17] it would be a moot exercise for this Court to pass upon the legality of

[16] 537 F.2d at 997, citing one-half page of decisions supporting its general statement of the law.
[17] *Sylvania, supra,* 537 F.2d at 997.



the location clause in the *Sylvania* case while leaving the Circuit Courts in conflict on the question of the lawfulness of the underlying exclusive dealing arrangement. The questions are inextricably bound together and this Court should grant certiorari in the case at bar so that both questions can be resolved at the same time.

The *Sylvania* decision was an outgrowth of a long line of decisions validating exclusive dealing arrangements. At the head of this line of cases is this Court's decision in *United States v. Arnold, Schwinn & Co., supra.* In that case, Schwinn had developed a practice of franchising approved retail outlets for designated locations, limiting the number of such outlets in any particular area. Each of the retail outlets was served by a designated Schwinn distributor who agreed with Schwinn to sell only to franchised Schwinn accounts and only in its designated territory, which had been allocated on an exclusive basis. Although striking down the territorial and customer restraints on the Schwinn distributors, this Court observed (388 U.S. at 376):

> "[A] manufacturer of a product other and equivalent brands of which are readily available in the market may select his customers, and for this purpose he may 'franchise' certain dealers to whom, alone, he will sell his goods. [Citing, *United States v. Colgate & Co.*]. If the restraint stops at that point—if nothing more is involved than vertical 'confinement' of the manufacturer's own sales of the merchandise to selected dealers, and if competitive products are readily available to others, the restriction, on these facts alone, would not violate the Sherman Act."

This same result has been reached in numerous Circuit Court decisions as well. For example, the court in *Bushie*

*v. Stenocord Corp.*, 460 F. 2d 116, 119-20 (9th Cir. 1972), ruled:

> "A manufacturer is free to agree with a third party to give him an exclusive distributorship 'even if this means cutting off another distributor,' * * * so long as in doing so there would be no resulting restraint of trade. * * *."

Similarly, in *Ark Dental Supply Co. v. Cavitron Corp.*, 461 F. 2d 1093, 1094 (3rd Cir. 1972), the court, in affirming summary judgment granted in favor of a manufacturer, said:

> "[I]t is indisputable that a single manufacturer or seller can ordinarily stop doing business with A and transfer his business to B and that such a transfer is valid even though B may have solicited the transfer and even though the seller and B may have agreed prior to the seller's termination of A."

In *Colorado Pump & Supply Co. v. Febco, Inc.*, 472 F. 2d 637 (10th Cir. 1973), *cert. denied* 411 U.S. 987 (1973), Febco, a manufacturer of lawn and turf equipment, entered into a written agreement whereby a distributor, Thompson, became the exclusive distributor for the entire state of Colorado and some adjacent territory. In upholding the exclusive, the court said (472 F. 2d at 640):

> "A manufacturer may select the customers to whom he will sell so long as his conduct has no monopolistic or market control purposes. * * * We have nothing more than a vertical confinement of sales to a selected customer of a product which is competitively available from others. This is not enough to establish a Sherman Act violation."



Finally, in *Ace Beer Distributors, Inc. v. Kohn, Inc.*, 318 F. 2d 283, 286 (6th Cir. 1963), the court sustained a grant of judgment on the pleadings in favor of the defendants where they were charged by the plaintiff with secretly agreeing to substitute Kohn, Inc. as an exclusive distributor in place of the plaintiff, commenting:

> "A manufacturer has a right to select its customers and to refuse to sell its goods to anyone, for reasons sufficient to itself. * * * A refusal to deal becomes illegal under the Act only when it produces an unreasonable elimination of competition or the creation of a monopoly."

See also, *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F. 2d 71, 76 (9th Cir. 1969), *cert. denied* 396 U.S. 1062 (1970); *Williams v. Independent News Co.*, 485 F. 2d 1099, 1104 (3rd Cir. 1973); *Wilson v. I.B.E. Industries*, 510 F. 2d 986, 989 (5th Cir. 1975).[18]

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[18]Several District Courts have also passed on the question. In *E. A. Weinel Construction Co. v. Mueller Co., supra*, the court granted judgment on the pleadings in favor of the manufacturer, commenting (289 F. Supp. at 298-9):

> "An exclusive agency or dealership necessarily involves a limited monopoly to sell the product of the manufacturer in the area covered by the exclusive agreement. Such limited monopolies are valid unless they are used to violate the antitrust laws. * * *
>
> "The fact that any other dealers in the same product of the same manufacturer are eliminated does not make the exclusive dealership illegal; it is the essential nature of the arrangement. The fact that the exclusive dealer asked for the arrangement does not make it illegal."

*Top-All Varieties, Inc. v. Hallmark Cards, Inc.*, 301 F.Supp. 703 (S.D. N.Y. 1969), also involved the dismissal for failure to state a claim of an action challenging an exclusive dealership arrangement. In dismissing the complaint, the court observed: "It is plain that an agreement between a manufacturer and a distributor setting up an exclusive territorial distributorship does not in itself violate the Sherman Act." (*Id.* at 704). See also, *Western Wholesale Liquor Co. v. Gibson Wine Co.*, 372 F.Supp. 802, 805-07 (D.S.D. 1974); *Peerless Dental Supply Co. v. Weber Dental Mfg. Co.*, 283 F.Supp. 288, 289-90 (E.D.Pa. 1968); *L.S. Good & Co. v. H. Daroff & Sons, Inc.*, 263 F.Supp. 635, 646-7 (N.D.W.Va. 1967).

One of the two most frequently cited automobile distributorship cases on this point is the Fourth Circuit's decision in *Schwing Motor Co. v. Hudson Sales Corp., supra.* The plaintiffs in that case were two established Hudson dealers in the Baltimore area who alleged that an agreement between Hudson and a third dealer to terminate the dealerships of the plaintiffs and give the third dealer an exclusive in the Baltimore area was in violation of the antitrust laws. In granting the defendants' motion to dismiss the complaint for failure to state a claim, the court commented (138 F. Supp. at 903):[19]

> "A manufacturer may prefer to deal with one person rather than another, and may grant exclusive contracts in a particular territory. * * *
>
> "An exclusive agency or dealership necessarily involves a limited monopoly to sell the product of a manufacturer in the area covered by the exclusive agreement. Such limited monopolies are not invalid [citing cases] unless they are used to violate the antitrust laws. They may not be used to extend the producer's monopoly into other fields, e.g. the financing of General Motors automobiles [citing cases]. Nor may they be used to establish market dominance and drive out the products of competitors. [Citing cases.] *But the mere fact that such an agreement necessarily gives the dealer a monopoly in handling the product of the particular manufacturer in a given area, and thereby enables the dealer to dictate the price at which the products of that manufacturer shall be sold in that area, subject to competition with the products of other manufacturers, does not condemn such agreements; otherwise all exclusive agency agreements would be illegal per se.* [Citing cases.]" (Emphasis added).

[19]The trial court's opinion was adopted as the opinion of the Court of Appeals (239 F.2d at 177).



The second leading case in the automobile area, decided just a year later, *Packard Motor Co. v. Webster Motor Car Co.*, 243 F. 2d 418 (D.C. Cir. 1957), *cert. denied* 355 U.S. 822, *rehearing denied* 355 U.S. 900 (1957), *rehearing denied* 357 U.S. 923 (1958), involved facts similar to *Schwing*. The largest of three Packard dealers in the Baltimore area told Packard it would resign its Packard dealership unless Packard made its dealership exclusive. Packard then terminated the other two dealers, one of whom brought the action. The case was decided on substantially the same grounds as *Schwing*. The court made the same points about relevant markets ("Since there are other cars 'reasonably interchangeable by consumers for the same purposes' as Packard cars, and therefore in competition with Packards, an exclusive contract for marketing Packards does not create a monopoly.") (243 F. 2d at 420) and about vertical arrangements ("The fact that Zell asked for the arrangement does not make it illegal. Since the immediate object of an exclusive dealership is to protect the dealer from competition in the manufacturer's products, it is likely to be the dealer who asks for it.") (*Id.* at 421).[20]

[20]The Court of Appeals suggests that *Packard* and *Schwing* must be limited to failing or weak companies. (Appendix C, *infra*, p. A20, n. 3). Such a position is supported neither by those decisions nor their progeny. While the *Packard* and *Schwing* courts could have limited their decisions on this narrow ground, they clearly did not. See, "Marketing and Franchising: Antitrust Prognosis for the 70's," 39 Antitrust L.J. 502, 511 (1970). Instead, the courts held that exclusive franchises are prima facie legal. Note, "Restricted Channels of Distribution Under the Sherman Act," 75 Harv. L. Rev. 795, 826 n. 114 (1962). Mr. Justice Brennan's comments regarding *Packard* and *Schwing* in his separate opinion in *White Motor Co. v. United States*, 372 U.S. 253, 269-70 n. 8 (1963), to the effect that those cases should be limited to failing or weak companies, must be read in the light of this Court's subsequent opinion in *Schwinn* holding that "if nothing more is involved than vertical 'confinement' of the manufacturer's own sales of the

The Court of Appeals made a three-fold attempt to remove itself from the ambit of the above-cited cases. It first ruled that Quality's assertion that there was no business justification for denying it a Lincoln franchise in the Minneapolis area might render the Prestige exclusive unreasonable. (Appendix C, *infra*, p. A20). None of the decisions discussed above, however, including this Court's opinion in *Schwinn*, made the legality of an exclusive dealing arrangement turn on the presence or absence of a business justification. The decision of the Sixth Circuit in *Ace Beer, supra*, in fact, affirmatively states that business justification is irrelevant, as long as the conduct is not motivated by monopolistic aims (318 F. 2d at 286):

> "A manufacturer has a right to select its customers and to refuse to sell its goods to anyone, *for reasons sufficient to itself*. * * * A refusal to deal becomes illegal under the Act only when it produces an unreasonable elimination of competition or the creation of a monopoly." (Emphasis added).

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merchandise to selected dealers, and if competitive products are readily available to others, the restriction, on these facts alone, would not violate the Sherman Act." (388 U.S. at 376). Nothing in *Schwinn* limits this holding to failing or weak companies, and, of course, Schwinn was neither.

> "Schwinn was not a newcomer, seeking to break into or stay in the bicycle business. It was not a 'failing company.' On the contrary, it was the leading bicycle producer in the nation."

*Id.* at 374. See also *Top-All Varieties, Inc. v. Hallmark Cards, Inc., supra* (involving the "leading" greeting card company); *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., supra* (involving one of the leading distillers of liquor); *Richardson v. Chrysler Motor Corp.*, 257 F.Supp. 547 (S.D.Tex. 1966) (involving one of the "big three" automobile manufacturers); and *Cartrade, Inc. v. Ford Dealers Advertising Association*, 446 F.2d 289 (9th Cir. 1971), *cert. denied* 405 U.S. 997 (1972) (involving an association of the dealers of one of the "big three" automobile manufacturers). Petitioners are aware of no case, other than the one at bar, where the court has refused to apply the *Schwing* and *Packard* rationale because the manufacturer involved was in a strong competitive position.



Second, the Court of Appeals also found it was significant in the case at bar that Prestige, under its agreement with Ford, had sole discretion to determine whether a horizontal competitor could enter the Minneapolis market. (Appendix C, *infra*, pp. A20-A21). The exclusive dealing arrangements validated in *Schwing, Packard, Ark Dental, Colorado Pump, Bushie*, and the other cases discussed above all gave the exclusive franchisees the same discretion. Indeed, any exclusive dealing arrangements would have that effect. That, of course, is not only the effect of every exclusive dealing arrangement, but it is the very purpose of such an agreement. See *GTE Sylvania Inc. v. Continental T.V., Inc., supra*, 537 F. 2d at 1002 n. 37. This is not to say, however, as the Court of Appeals did (Appendix C, *infra*, p. A21), that such an effect converts a vertical arrangement into a horizontal one condemned by *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972), and *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F. 2d 1230 (3rd Cir. 1975). A purely vertical agreement which has the effect of eliminating horizontal competitors, contrary to the Court of Appeals decision in the instant case, cannot be equated to a conspiracy among horizontal competitors to eliminate competition.

Nowhere in the complaint in the case at bar is it alleged that Ford is a mere instrumentality of its dealers or that two or more Lincoln dealers have agreed to allocate territories. All that is alleged is that a single dealer entered into an exclusive dealing arrangement with a single manufacturer. Under these circumstances, it is conceptually impossible to conclude that any "horizontal" restraint has occurred:

> "One of the classic examples of a per se violation of §1 is an agreement between *competitors at the same level of the market structure* to allocate territories in order to minimize competition. Such concerted action is usually termed a 'horizontal' restraint, in contradistinction to combinations of *persons at different levels of the market structure*, e.g. manufacturers and distributors, which are termed 'vertical' restraints." (Emphasis added).

*United States v. Topco Associates, Inc., supra,* 405 U.S. at 608. Since the arrangement between Ford and Prestige was clearly a "vertical," not "horizontal," agreement, the *Topco* and *American Motor Inns* cases are inapposite.

Finally, the Court of Appeals relied upon its somewhat exaggerated conclusion that Quality had pled an exclusive franchise of a "perpetual" nature. (Appendix C, *infra,* p. A22).[21] None of the decisions discussed above, however, including this Court's decision in *Schwinn,* make the legality of an exclusive dealing arrangement turn on the reasonableness of the duration of the franchise. This novel

[21]In its search to find some basis for a claim in the complaint, the Court of Appeals simply went too far in this regard. There is absolutely no predicate in the pleadings for this conclusion. Nowhere in Quality's complaint is it alleged that the exclusive arrangement between Ford and Prestige was of perpetual duration. Moreover, Quality's claim to this effect in the Court of Appeals was clearly disingenuous. In truth, the 1962 letter agreement between Ford and Prestige, which was identified by the president of Quality at his deposition as the letter referred to in Paragraph 17(c) of the complaint, provides:

> "If you become the Lincoln-Mercury dealer as a replacement for Mitchell & Boyer, Inc., we would not propose any additional Lincoln representation in Minneapolis for at least two years and then only if Lincoln penetration of Price Class is less than District Average."

Thus, the exclusive was guaranteed to Prestige for only two years and its continued existence thereafter was specifically tied to market conditions. Quality not only failed to allege that the exclusive was of a perpetual nature, but it could not have done so consistent with Rule 11 of the Federal Rules of Civil Procedure.



and unprecedented aspect of the Court of Appeals decision is an open invitation for lawsuits claiming that any successful exclusive is an illegal restraint because it has been in effect unreasonably long.

## CONCLUSION

In protracted or complex cases, such as the one at bar, the Courts, not only to lighten the burden and expense of such cases to the litigants, but also to free their own dockets for meritorious claims, must closely scrutinize the pleadings to be certain that some basis for a claim is stated upon which relief can be granted.[22] The rationale for closely scrutinizing the pleadings in complex cases was well-stated by Judge Dawson in the Seminar on Protracted Cases:[23]

> "The filing of a complaint in a federal court is, in effect, a license to the plaintiff to subject the defendant to the expense and difficulties of extensive discovery proceedings. The least that can be expected is that the plaintiff, as a condition of getting this license, should be able to set forth in a complaint a short and plain statement of the plaintiff's claim against the defendant, showing that the plaintiff is entitled to relief against the defendant. (Rule 8(a), Rules of Civil Procedure).
>
> "Since the 'big case' almost necessarily pre-supposes 'big' discovery, it may indeed be necessary that the complaint set forth the basis of the claim with more precision than the ordinary run-of-the-mill case.

[22]2A Moore's Federal Practice ¶ 8.13, p. 1708 ("What is a 'short and plain' statement depends, of course, on the circumstances of the case. For example, a complaint for conversion, or to recover on a note, can be stated in half a page. On the other hand, a complaint dealing with a complex matter, as in an antitrust action, * * * will be more extended and may require more particularity.") (Footnotes omitted).

[23]"Seminar on Protracted Cases," 23 F.R.D. 319, 431-32 (1958).

> * * * A person would have to be particularly naive if he did not realize that today certain lawsuits are started and discovery proceedings instituted not so much to secure recovery at a trial as to create sufficient expense and harassment to the adversary to force a settlement for a substantial nuisance value."

In overruling the District Court in the case at bar, the Court of Appeals held that Quality had made a sufficient showing in its pleadings to be granted a license to expose Ford and Prestige to the burden and expense of discovery and trial. In reaching this result, the Court of Appeals placed itself in conflict with decisions of other Courts of Appeals and this Court on the same subject and opened the door to protracted litigation in the district courts in every case where an application for a franchise is rejected on the ground that the franchisor has already granted an exclusive franchise in the area where the applicant seeks to locate his business.

For the foregoing reasons, this Court should grant a writ of certiorari to review the decision of the Court of Appeals.

Respectfully submitted,

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December 1976.



## APPENDIX A

United States District Court
District of Minnesota
Fourth Division

Quality Mercury, Inc.,
Plaintiff,

vs.

Ford Motor Company, Ford Marketing Corporation, Prestige Lincoln-Mercury, Inc., N. Grossman, and H. I. Grossman,
Defendants.

4-74 Civ. 477.

### MEMORANDUM ORDER

(Filed in U.S. District Court June 3, 1975)

Defendants Prestige Lincoln-Mercury, Inc., N. Grossman and H. I. Grossman move the Court for an Order granting them judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. They make this motion on the ground that plaintiff's complaint fails to state a cause of action upon which relief may be granted.

Plaintiff Quality Mercury, Inc. (Quality), is an authorized Mercury dealership located in Bloomington, Minnesota, a suburb of Minneapolis. It has operated continuously since January 1968. It sells and leases Mercury line of automobiles as well as used cars and a foreign made auto-

mobile. It also provides repairs for customers and sells parts and accessories. It asserts that its "dealer's locality" is the Minneapolis market which covers Hennepin County and adjacent areas. It considers its primary market to be South Minneapolis and the Southern Minneapolis suburban area.

Defendants in this case are Ford Motor Company, Ford Marketing Corporation (known hereafter collectively as Ford), and Prestige Lincoln-Mercury, Inc., and two of its principal shareholders and officers, N. Grossman and H. I. Grossman (known hereafter collectively as Prestige).

Ford Motor Company is a major manufacturer of automobiles, including the Mercury and Lincoln lines. Ford Motor Company sells its automobiles through the Ford Marketing Corporation to authorized Ford dealers.

Defendant Prestige is a Lincoln-Mercury dealership located in St. Louis Park, Minnesota, a western suburb of Minneapolis. It has operated continuously since 1962. It sells and leases Lincoln and Mercury automobiles as well as used automobiles. It also provides repair service and sells parts and accessories. Prestige asserts in its answer that its "dealer's locality" for the Mercury line is 43% of Hennepin, Anoka and Isanti counties and for the Lincoln line Hennepin, Anoka, Carver, Isanti and Scott counties. Prestige asserts that its primary market area includes the entire Twin City metropolitan area for both the Lincoln and Mercury line of automobiles.

Plaintiff asserts in its complaint that the defendants have combined and conspired to restrain trade and commerce in violation of §1 of the Sherman Act, 15 U.S.C. §1, by maintaining Prestige as the sole Lincoln dealership in the Minneapolis area and by denying Quality a franchise to sell Lincolns. Plaintiff seeks by this action "judgment that de-



fendant Ford Motor or Ford Marketing, or both, enter into a standard Lincoln dealership agreement with plaintiff so that plaintiff can sell the Lincoln line of automobiles and related parts and services from plaintiff's place of business." Complaint, p. 6. It also seeks judgment of an undisclosed amount of damages.

In reviewing a motion to dismiss for failure to state a claim, all well-pleaded allegations of facts must be accepted as true and the plaintiff is entitled to the benefit of all reasonable inferences arising therefrom. *Collins v. Handyman,* 341 U.S. 651 (1952), and *L. S. Good & Company v. H. Daroff & Sons, Inc.,* 263 F.Supp. 635 (N.D. W. Va. 1967).

In its complaint Quality asserts that Ford and Prestige have violated the antitrust laws by maintaining Prestige as the sole Lincoln dealership in the Minneapolis market with no other purpose than to insulate Prestige from intrabrand competition. It asserts the following acts by the defendants in furtherance of the conspiracy: (1) granting Prestige the sole Lincoln dealership nothwithstanding determinations by both Ford and Prestige that there is a need for another Lincoln dealership in the Minneapolis area; (2) refusing to grant plaintiff a Lincoln dealership notwithstanding the policy of Ford's Lincoln-Mercury division that its supervised dealers should sell both lines of automobiles; and (3) representing to plaintiff that a letter from an agent of Ford to Prestige dated April 11, 1962, is a binding contract which prevents Ford from franchising an additional Lincoln dealership in the Minneapolis area despite Ford's policy of franchising additional Lincoln dealers at sites which are more than 10 miles from an existing Lincoln dealer.

It is clear that an agreement between a manufacturer and a distributor setting up an exclusive territorial distributorship in and of itself does not violate the Sherman Act even if the impetus for the exclusive agreement comes from the distributor. *Schwing Motor Co. v. Hudson Sales Corp.*, 138 F. Supp. 899 (D. Md. 1956), *aff'd* 239 F.2d 176 (4th Cir. 1956), *cert. denied* 355 U.S. 823 (1957) (automobile exclusive franchise case); *Packard Motor Car Company v. Webster Motor Car Company*, 243 F.2d 418 (D.C. Cir. 1957), *cert. denied* 355 U.S. 822, *rehearing denied*, 355 U.S. 900 (1957), *rehearing denied*, 357 U.S. 923 (1958) (automobile exclusive franchise case); *L. S. Good & Company v. H. Daroff & Sons, Inc., supra* (clothing exclusive franchise case), and *Western Wholesale Liquor Company v. Gibson Wine Company*, 372 F. Supp. 802 (D. S.Dak. 1974) (liquor wholesale distributor exclusive franchise case).

The Supreme Court stated in discussing exclusive franchises or vertical monopolies:

> ". . . [A] manufacturer of a product, other and equivalent brands of which are readily available in the market, may select his customers, and for this purpose he may 'franchise' certain dealers to whom, alone, he will sell his goods. Cf. *United States v. Colgate & Co.*, 250 U.S. 300 (1919). If the restraint stops at that point—if nothing more is involved than vertical 'confinement' of the manufacturer's own sales of the merchandise to selected dealers, and if competitive products are readily available to others, the restriction, on these facts alone, would not violate the



> Sherman Act." *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 376 (1967).

Plaintiff agrees that a manufacturer can deal unilaterally with whomever it pleases. However, it asserts that the issue raised in the complaint is not whether Ford can unilaterally grant an exclusive franchise to Prestige, refuse to deal with Quality and thereby create a vertical monopoly. It asserts that the real issue is whether Prestige can "prevent" Ford from granting Quality a Lincoln dealership in an area that needs one, thereby creating an illegal horizontal monopoly.

Plaintiff suggests that the kind of monopoly alleged to exist here is similar to those found to be in violation of the antitrust laws in *United States v. Sealy, Inc.*, 388 U.S. 350 (1967), *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972), and *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 1973-2 Trade Cases, Para. 74,685 (D. N.J. 1973).

In *Sealy, supra*, the Supreme Court found illegal the territorial limitations created in a plan whereby licensor, controlled by its licensees which owned substantially all of the licensor's stock, granted mutually exclusive territories for the manufacture and sale of mattresses and bedding products under licensor's name and trademark. The Court found that this allocation of territories was part of an aggregation of trade restraints that included unlawful price fixing and therefore in violation of the antitrust laws.

In *Topco, supra*, an association of small and medium sized regional supermarket chains had organized themselves along the lines of the licensor and licensees in *Sealy*.

Under the Topco plan each Topco member was granted an area in which they had the exclusive or de facto exclusive license to sell Topco brand products. Topco members were allowed to sell Topco goods at wholesale prices only with special permission of the Association and then only within the specific geographical area designated.

Topco members also owned all of the voting stock of Topco Associates, Inc., and the Topco Board of Directors were all executives or officers of Association members. When applying for admission into the Topco Association an applicant had to be approved by an affirmative vote of 75% of the Association's members. If, however, the member whose operations were the nearest to those of the applicant or any member whose operations were located within 100 miles of the applicant, voted against approval, an affirmative vote of 85% was required.

The Supreme Court found that the overall impact of these restraints constituted an illegal horizontal restraint and held that these practices were a per se violation of the Sherman Act.

In *American Motor Inns, Inc. v. Holiday Inns, Inc., supra,* the District Court found that the market effect of three practices of Holiday Inns, Inc., and its franchisees violated the antitrust laws. Holiday Inns, Inc., followed a practice of allowing existing Holiday Inn franchisees to object to the granting of a new franchise in their market area. In practice, the Court found that an objection meant a disallowed application. Holiday Inns, Inc., also required franchisees to agree not to own or operate another inn or motel while operating a Holiday Inn. Holiday Inns, Inc., also had a policy of establishing company owned franchises in certain areas and of not allowing other non-company franchises to compete with the company owned inns.



The Court held:

> "Regardless of the market effect of each of these devices standing alone, however, their combined effect and the totality of their operation results in a horizontal allocation of territories." *Id.*, at p. 95,027.

The Court did not hold that the radius letter policy in and by itself was a violation of the antitrust laws but stated that it was "a means of allocating territories horizontally so as to reduce intra-brand competition among HI [Holiday Inns] franchisees." *Id.*

This Court does not find the policies and practices of the defendants as set forth in the complaint similar to those set forth above. In its complaint Quality has not alleged any illegal ramification of the exclusive franchise enjoyed by Prestige such as the price fixing found in *Sealy, supra.* Nor is there alleged any overall scheme by which the existing Lincoln dealers control the Board of Directors of Ford or set criteria on marketing areas, vote upon who may be accepted as new franchisees or limit territories such as those found in *Topco, supra.*

This Court also does not find the allegations in Quality's complaint similar to the situation that existed in *American Motor Inns, supra.* There are no allegations that Mercury dealers are prohibited from selling other lines of automobiles while also selling Mercury automobiles. Indeed, Quality states in its complaint that it also carries a line of foreign made automobiles along with Mercury automobiles. Complaint, p. 3. There are also no allegations of market-

ing areas exclusively reserved for company owned franchises such as existed in *American Motor Inns, supra.*

Instead, the facts in this case as pleaded by plaintiff can be more readily compared with the factual situations in *Schwing Motor Co. v. Hudson Sales Corp., supra,* and *Packard Motor Car Company v. Webster Motor Car Company, supra.*

In *Schwing, supra,* the plaintiffs were two established Hudson dealers in the Baltimore, Maryland, area who alleged that an agreement between Hudson and a third dealer to terminate the dealerships of the plaintiffs and give the third dealer an exclusive franchise in the Baltimore area, was in violation of the antitrust laws. The Court granted the defendants' motion to dismiss the complaint for failure to state a claim. It found that "every manufacturer has a natural and complete monopoly of his particular product." 138 F. Supp. at 902. It also held that "[a]n exclusive agency or dealership necessarily involves a limited monopoly to sell the product of the manufacturer in the area covered by the exclusive agreement." *Id.* at 903.

In *Packard, supra,* the franchises of two dealers were terminated by Packard on the insistence of a third dealer in the same geographical area. The Court also ruled for the defendants and added that the fact the third and remaining distributor had insisted upon the exclusive franchise did not make it illegal.

This Court concludes that the plaintiff has pled only an exclusive franchise agreement between Prestige and Ford of the variety found to be legal in *Schwing, supra,* and *Packard, supra.* The Court also finds a close resemblance to the situation pled in plaintiff's complaint and those



found to be legal in *Top-All Variety, Inc. v. Hallmark Cards, Inc.,* 301 F. Supp. 703 (S.D. N.Y. 1969) (exclusive franchise in the greeting card industry), and *Ace Beer Industries v. Kohn, Inc.,* 318 F.2d 283 (6th Cir. 1963) (exclusive franchise in beer distribution).

As a second and alternative ground for dismissing plaintiff's complaint against the moving defendants for failure to state a cause of action, the Court finds the injury alleged in plaintiff's complaint insufficient to state a cause of action under § 1 of the Sherman Act.

In granting defendants' motion to dismiss for failure to state a claim upon which relief can be granted, the Court in *Schwing, supra,* stated:

> "The main purpose of the anti-trust laws is to protect the public from monopolies and restraints of trade, and the individual right of action for treble damages is incidental and subordinate to that main purpose. [Citations omitted.] Public injury alone justifies the threefold increase in damages. It is essential, therefore, that the complaint allege facts from which it can be determined that the conduct charged to be in violation of the anti-trust laws was reasonably calculated to prejudice the public interest by unduly restricting the free flow of interstate commerce." 138 F. Supp. at 903.

Quality in its complaint makes only the most general and vague allegations of injury to the public resulting from the alleged illegal conduct of the defendants. It asserts only that the public is being deprived of a needed

Lincoln deaership and the benefits of competition that would result from such an outlet. Complaint p. 6. Furthermore, there are no allegations of interbrand restraints because of the activities of the defendants. Plaintiff admits in its complaint that the Lincoln line of automobiles are "high-priced, luxury automobiles, competing with Cadilac and Chrysler Imperial." Complaint p. 2. What the plaintiff does allege is loss of profit and business to itself.

It is clear that damage to Quality alone does not make an exclusive dealership illegal. The Court in *Ace Beer Distributors, Inc. v. Kohn, Inc.*, 318 F.2d 283, 286-7 (6th Cir. 1963), stated:

> "A manufacturer has a right to select its customers and to refuse to sell its goods to anyone, for reasons sufficient to itself. [Citation omitted.] A refusal to deal becomes illegal under the Act only when it produces an unreasonable restraint of trade, such as price fixing, elimination of competition or the creation of a monopoly. [Citation omitted.] The fact that a refusal to deal with a particular buyer without more, may have an adverse effect upon the buyer's business does not make the refusal to deal a violation of the Sherman Act. Damage alone does not constitute liability under the Act."

*Accord, E. A. Weinel Construction Co. v. Mueller Co.*, 289 F. Supp. 293, 298 (E.D. Ill. 1968); *Potter's Photographic Applications Co. v. Ealing Corp.*, 292 F. Supp. 92, 104 (E.D. N.Y. 1968), and *Top-All Varieties, Inc. v. Hallmark Cards, Inc., supra.*



It Is Ordered:

1. That the motion of defendants Prestige Lincoln-Mercury, Inc., N. Grossman and H. I. Grossman for judgment on the pleadings is granted.

June 3, 1975.

/s/ EARL R. LARSON
United States District Judge

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**APPENDIX B**

United States District Court
District of Minnesota
Fourth Division

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Quality Mercury, Inc.,

Plaintiff,

vs.

Ford Motor Company, Ford Marketing Corporation, Prestige Lincoln-Mercury, Inc., N. Grossman, and H. I. Grossman,

Defendants.

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4-74 Civ. 477.

ORDER

(Filed in U.S. District Court July 11, 1975)

The above-entitled matter came on for hearing before the Honorable Earl R. Larson, Judge of the above-named

Court, on July 9, 1975 at 8:45 a.m. on the motion of defendants Ford Motor Company and Ford Marketing Corporation for judgment on the pleadings. Dorsey, Marquart, Windhorst, West & Halladay by Lynn Krominga appeared for the moving defendants; Cox, King & Stern by Charles A. Cox appeared for the plaintiff; Leonard, Street & Deinard by Charles A. Mays appeared for defendant Prestige Lincoln-Mercury, Inc. The Court having considered the motion and arguments of counsel, and upon all the files, records, and proceedings herein.

It is Ordered:

That the motion of defendants Ford Motor Company and Ford Marketing Corporation for judgment on the pleadings is granted.

Dated July 10, 1975.

/s/ EARL R. LARSON
United States District Judge

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## APPENDIX C

United States Court of Appeals
For The Eighth Circuit

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Nos. 75-1489 and 75-1602

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Quality Mercury, Inc.,

Appellant,

vs.

Ford Motor Company, Ford Marketing Corporation, Prestige Lincoln-Mercury, Inc., N. Grossman and H. I. Grossman,

Appellees.

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Appeal from the United States District Court for the District of Minnesota.

Submitted: February 11, 1976

Filed: September 27, 1976

Before LAY, HEANEY and STEPHENSON, Circuit Judges.

LAY, Circuit Judge.

Quality Mercury, Inc. appeals from the district court's grant of judgment on the pleadings in favor of the defendants pursuant to Fed. R. Civ. P. 12(c).

The pleaded facts may be summarized as follows. Quality is an automobile dealer in Bloomington, Minnesota, a

suburb of Minneapolis. It sells Mercury automobiles which are manufactured by defendant Ford Motor Co. and marketed by the Lincoln-Mercury division of defendant Ford Marketing Corp. Under an agreement with Quality, Lincoln-Mercury may franchise another Mercury dealer only if the other dealer's place of business is more than ten miles from Quality's.

Defendant Prestige Lincoln-Mercury, operated by defendants N. Grossman and H. I. Grossman, sells Mercury and Lincoln automobiles in St. Louis Park, Minnesota, within the Minneapolis area but more than ten miles from Quality.

Quality, which has not been franchised to sell Lincolns, contends that no franchise had been allowed because in 1962, before Quality was in existence, Ford bound itself not to create another Lincoln dealership in the Minneapolis area without Prestige's consent. Quality contends that this in effect grants Prestige a contract in perpetuity and unlawfully prevents Ford from awarding Quality a Lincoln dealership.

Quality asserts further that this agreement is an unlawful combination and conspiracy to restrain trade in violation of § 1 of the Sherman Act. As a result Quality contends it has been damaged, and "the public has and will continue to be injured by being deprived of a needed Lincoln outlet for sales, leasing and service in a large and significant trade area and the benefits of competition that would result from such an outlet." Quality prays for treble damages and injunctive relief.

The Prestige defendants (Prestige and the two Grossmans) filed an answer denying many of Quality's allega-



tions. They admitted that, to induce the Grossmans to operate a Lincoln dealership, Ford promised not to open any Lincoln dealerships in Minneapolis for two years, and thereafter to do so only if "Lincoln penetration of Price Class in Minneapolis locality is less than District Average."[1] In fact, Prestige asserts, Ford allowed two Lincoln dealerships in the Minneapolis area after it franchised Prestige. The Ford defendants filed a separate answer, substantially denying all of the allegations of the complaint.

Prestige and Ford both moved for judgment on the pleadings. Their motions were granted and Quality has appealed.

I.

Section 1 of the Sherman Act, 15 U.S.C. § 1, reads, in part, as follows:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

In *Northern Pacific Ry. v. United States*, 356 U.S. 1 (1958), the Supreme Court discussed the general purpose of the antitrust laws:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserv-

[1]There is a conflict between the parties as to the character of the Ford obligation to refrain from creating another Lincoln dealership in the area. Quality has taken the position, emphasized strongly on appeal, that Ford agreed never to grant another Lincoln franchise in the area. Ford contends, in contrast, that the restriction was as indicated in the text.

> ing free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.

Id. at 4.

We must construe all well pleaded factual allegations of the Complaint as true and draw in favor of Quality all reasonable inferences and intendments from these facts. See *National Metropolitan Bank v. United States,* 323 U.S. 454 (1945). In so construing the complaint, we find it alleges that Ford and Prestige have bound themselves to an arrangement whereby a horizontal competitor (Prestige) has a perpetual veto power over all applications for Lincoln franchises in the Minneapolis area, thus interfering with the "unrestrained interaction of competitive forces" in the Minneapolis automobile market.

With this construction of the complaint we must decide whether the plaintiff has stated a proper claim for relief under the antitrust laws.

Our initial inquiry is whether plaintiff has alleged, under § 1 of the Sherman Act, a "contract, combination . . . or conspiracy" in restraint of trade. If Ford's refusal to deal with Quality was merely a unilateral or independent decision there would be no such contract. *See United States v. Colgate & Co.,* 250 U.S. 300 (1919). However, if more than mere unilateral action was involved, then Ford has created a combination. See *Albrecht v. Herald Co.,* 390



U.S. 145 (1968); and *United States v. Parke, Davis & Co.,* 362 U.S. 29 (1960).

In order for Quality to show a "contract, combination . . . or conspirary," it was not necessary to plead a formal agreement between Ford and Prestige. An allegation that their conduct was "joint or collaborative" was sufficient. *See United States v. General Motors Corp.,* 384 U.S. 127 (1966); *Reed Brothers, Inc. v. Monsanto Co.,* 525 F.2d 486 (8th Cir. 1975), *cert. denied,* 96 S.Ct. 787 (1976); *American Motors Inns, Inc. v. Holiday Inns, Inc.,* 521 F.2d 1230 (3d Cir. 1975); and *Ford Motor Co. v. Webster's Auto Sales, Inc.,* 361 F.2d 874 (1st Cir. 1966). *Cf. United States v. Arnold, Schwinn & Co.,* 388 U.S. 365, 391 n. 12 (1967) (Stewart, J., dissenting). Thus, whether an unlawful combination or conspiracy existed was to be judged by Ford's and Prestige's words and actions and not by the terms of the agreement. *See United States v. Parke, Davis & Co., supra;* and *American Holiday Inns, Inc. v. Holiday Inns, Inc.,* 365 F. Supp. 1073, 1090 (D. N.J. 1973), *aff'd. in part,* 521 F.2d 1230 (3rd Cir. 1975). Accepting Quality's allegations as true and applying the foregoing principles, we conclude that Ford's action in denying Quality's application was not taken unilaterally, but rather "jointly or collaboratively" with its franchisee, Prestige.

However, not all "contracts, combinations . . . or conspiracies" in restraint of trade are unlawful. We must therefore determine whether the alleged restraint has some factual underpinning upon which it might be declared unreasonable.[2]

---

[2]Quality does not contend that the defendants conduct is a *per se* violation of § 1 of the Sherman Act. Therefore our inquiry is whether the alleged restraint is unlawful under the rule of reason.

In holding that vertical agreements granting exclusive franchises to dealers were not violative of antitrust laws, the district court relied on several decisions which have held that a manufacturer may terminate a distributorship held by one party and transfer it to another without violating the Sherman Act. Moreover, the manufacturer may consult with the new distributor, and, prior to termination of the old distributor, reach agreement with him about the termination and transfer. *See Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970) and cases there cited; *Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F.2d 418 (D.C. Cir. 1957); *Schwing Motor Co. v. Hudson Sales Corp.*, 138 F. Supp. 899 (D. Md.), *aff'd*, 239 F.2d 176 (4th Cir. 1956), *cert. denied*, 355 U.S. 823 (1957). The essential reasoned analysis behind these cases is that it is not an unreasonable restraint of trade for a franchisor to exercise his independent judgment as to with whom he chooses to deal. As the Supreme Court observed in *United States v. Arnold, Schwinn & Co.*, *supra* at 376:

> [A] manufacturer of a product other and equivalent brands of which are readily available in the market may select his customers, and for this purpose he may "franchise" certain dealers to whom, alone, he will sell his goods. Cf. *United States v. Colgate & Co.*, 250 U.S. 300 (1919). If the restraint stops at that point—if nothing more is involved than vertical "confinement" of the manufacturer's own sales of the merchandise to selected dealers, and if competitive products are readily available to others, the restriction, on these facts alone, would not violate the Sherman Act.



Most of the decisions dealing with further restraints, the issue left unanswered by *Schwinn*, have dealt with terminations or cancellations of dealers by a manufacturer pursuant to an agreement with either a competing or succeeding dealer. In *Schwing Motor Co. v. Hudson Sales Corp.*, *supra*, and *Packard Motor Car Co. v. Webster Motor Car Co.*, *supra*, manufacturers terminated dealerships pursuant to an agreement or understanding with a competing dealer. Both courts held that a manufacturer has a right to select his customers and may agree with one to exclude another, if: (1) the agreement is not a horizontal one between competitors; (2) the manufacturer is not using it to establish market dominance; or (3) the manufacturer is not using it to promote a monopoly.

The *Packard* decision was not unanimous. In his dissent Judge Bazelon emphasized that there was substantial evidence to support the jury's verdict that the cancellation was not a unilateral decision by the manufacturer, but rather resulted from an agreement between the manufacturer and a dealer to eliminate the competing dealers. Judge Bazelon criticized the *Schwing* decision for its restrictive view of the unreasonableness of vertical restraints:

> [That] case would limit the manufacturer's right to select his own customers by the requirement that he make no agreement with one to exclude another. Schwing would recognize this limitation only "if the agreement is a horizontal one between competitors, or if the manufacturer dominates the market in the

> commodity." 138 F. Supp. at page 906. In this I think Schwing is wrong. The Supreme Court has held that, even apart from monopolistic effect, a vertical agreement which excludes a competitor of one of the parties from a substantial market violates § 1 of the Sherman Act.

243 F.2d at 422.[3]

In *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), the Ninth Circuit drew the proper line in determining the reasonableness of vertical restraints. The court observed that the determination of the reasonableness of vertical combinations or conspiracies in restraint of trade should focus on whether its purpose or effect was anticompetitive.[4] We agree with this analysis early supported by Judge Bazelon's dissent.

Quality's complaint alleges that there was no valid business reason for the denial of a new Lincoln dealership in the Minneapolis area. We find this absence, when combined with the allegation that Prestige, a horizontal competitor, could in its sole discretion determine if the Minneapolis market was to be serviced by another Lincoln dealership, renders reasonable the inference of an anticompetitive motive or effect.

[3]Despite Judge Bazelon's dissent, the *Packard* and *Schwing* decisions have been cited as precedent for the proposition that an exclusive franchise is valid as long as it does not constitute a horizontal conspiracy or monopoly. However, in *White Motor Co. v. United States*, 372 U.S. 253, 269 n. 8 (1963), Justice Brennan, concurring, commented that *Packard* and *Schwing* were of limited scope since both Packard and Hudson were small car manufacturers and needed the exclusions in order to enhance their positions in competition with the large automakers. *See also, Ace Beer Distributors, Inc. v. Kohn, Inc.*, 318 F.2d 283 (6th Cir. 1963); and *Top-All Varieties, Inc. v. Hallmark Cards, Inc.*, 301 F.Supp. 703 (S.D. N.Y. 1969).

[4]In applying this test the court found no violation of the Act since the combination was found to be the result of a legitimate business interest of the manufacturer in "the quality, competence and stability of his distributors." *Id.* at 80. In addition, we note that *Seagram* dealt with the application of a *per se* rule, while our inquiry proceeds under the rule of reason.



The unreasonable character of agreements allowing horizontal competitors to exercise in effect a veto power over a new franchise application was considered in *United States v. Topco Assoc., Inc.*, 405 U.S. 596, 608 (1972); and *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230 (3d Cir. 1975). In the latter case, AMI's application for a Holiday Inn franchise at the Newark Airport was rejected. In considering the application, Holiday mailed written notices of the application to the three Holiday Inn franchises nearest the airport site. These "radius letters" were standard procedure in reviewing applications. The trial court found that a negative response by an existing franchisee was treated as a veto over the application. On appeal Judge Adams said:

> By thus permitting its existing franchisees to determine whether a potential competitor would be allowed to enter the Elizabeth-Newark market, HI enabled its franchisees already in the Elizabeth-Newark area to divide that market between themselves, thus precluding further intrabrand competition. Such conduct constitutes a horizontal market allocation that is a violation of the Sherman Act.

*Id.* at 1242.[5]

[5]*Holiday Inn* may, of course, be distinguished on its facts. The franchisees in *Holiday Inn* did not possess exclusive franchises. Also the combination was between two or more horizontal competitors and the franchisor, while here the alleged combination was between one horizontal competitor and the franchisor. But we do not consider

In addition to the granting of sole discretion to a *horizontal competitor* as to the entry of another dealership in the Minneapolis area, we find the *character and nature* of this discretionary power an integral aspect in our analysis. A fair construction of Quality's pleadings is that Ford and Prestige violated the Sherman Act by agreeing to an exclusive franchise in *perpetuity*. The granting of a perpetual exclusive franchise is suspect under the Sherman Act, because changes in conditions, unforeseen when the exclusive franchise was granted, may combine to create an anticompetitive effect.[6] Moreover, the suspicion of the perpetual exclusive franchise is intensified in this case by Quality's additional allegation that there were no valid business reasons for the denial of a new Lincoln dealership in the Minneapolis Area.

these differences critical. While the presence of a horizontal conspiracy would render the restraint a *per se* violation of § 1, the absence of a horizontal conspiracy does not automatically render the restraint reasonable. A purely vertical agreement can be an unreasonable restraint in violation of § 1 of the Sherman Act. *See Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969); *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967); *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960).

[6]While there are no decisions finding a Sherman Act violation in a case such as this, persuasive suggestions have been made that such a finding might be proper. *See* Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655, 704 (1962); Note, *Restricted Channels of Distribution Under the Sherman Act*, 75 Harv. L. Rev. 795 (1962). The position is taken that when a manufacturer goes beyond the simple grant of a franchise and promises an exclusive franchise lasting for some time into the future, its action becomes suspect. A cogent economic analysis is made in the Harvard note:

> When by unilateral decision a manufacturer has appointed only one outlet in a particular area, three principal forces operate to limit the price charged by the outlet for the manufacturer's product. The first is the possibility of interbrand competition. The second is the possibility of intrabrand competition from fellow dealers or distributors outside the outlet's territory; this check will come into play when the outlet's price becomes sufficiently high to overcome the barriers of interterritorial cost that normally serve to keep customers and sellers in their own areas. The third is the possibility of intrabrand competition from within the outlet's own area should the manufacturer decide either to sell there directly or appoint another outlet. The anticompetitive effect of the exclusive franchise lies in its elimination of the last check. Whatever the strength of the other two competitive forces, the dealer or distributor would hardly have sought the exclusive if it did not confer some measure of protection from competition. And when the outlet occupies an entrenched position in the local market—owing to an ideal location, possession of the best retail accounts, or simply status as the sole dealer or distributor of such products in the area—the exclusive may serve to confirm a substantial amount of monopoly power in the outlet. The anticompetitive effect may be aggravated by factors unforeseen when the exclusive was granted. A population influx or change in buying habits may create an increased demand, which in the absence of the exclusive might well lead the manufacturer to establish a second outlet in the area. The exclusive outlet may be content to benefit from the changed conditions by raising price rather than increasing volume.
>
> *In view of the potentially significant anticompetitive effect, it is proper to demand a convincing justification for the manufacturer's going beyond a unilateral decision and binding himself by the promise of an exclusive franchise.*

75 Harv. L. Rev. at 824-25 (emphasis added).



Under these circumstances this case should not have been dismissed by a judgment on the pleadings, and Quality should have been allowed an opportunity to prove the unreasonableness of the restraint.

II.

As an alternative basis for its judgment, the district court held that the complaint was deficient for failing to contain sufficient allegations of public injury. An antitrust complaint must "allege facts from which it can be determined that the conduct charged to be in violation of the antitrust laws was reasonably calculated to prejudice the public interest by unduly restricting the free flow of interstate commerce." *Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, 214 F.2d 891, 894 (5th Cir. 1954). How-

ever, in determining whether Quality's complaint has satisfied this standard, we are guided by Fed. R. Civ. P. 8(f) which requires us to construe the pleadings to do substantial justice. This principle of construction is particularly appropriate in antitrust cases as was recently observed by the Supreme Court:

> We have held that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitled him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (footnote omitted). And in antitrust cases, where "the proof is largely in the hands of the alleged conspirators," *Poller v. Columbia Broadcasting System Inc.*, 368 U.S. 464, 473 (1962), dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly. *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 96 S.Ct. 1848, 1853 (1976).

The complaint alleged "the public had and will continue to be injured by being deprived of the needed Lincoln outlet for sales, leasing and service in a large and significant trade area and the benefits of competition that would result from such an outlet." We deem this language sufficient. The purpose of the Sherman Act is the elimination of restrictions on competition. This paragraph alleges that, but for the illegal restraint, there would be competition in the sale, leasing and service of Lincoln automobiles from which the public would benefit. This allegation could be made more specific only by alleging in detail the specific probable effects of increased competition (e.g., reduced



prices, improved service). But such detail in pleading is not required under the federal rules, even in an antitrust case. See Wright & Miller, *Federal Practice and Procedure* § 1228 (1969).

Judgment reversed and remanded to the district court for further proceedings.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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## APPENDIX D

15 U. S. C. § 1, pp. 2978-2979:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such re-

sale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

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## APPENDIX E

United States District Court
District of Minnesota
Fourth Division

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Quality Mercury, Inc.,

Plaintiff,

vs.

Ford Motor Company, Ford Marketing Corporation, Prestige Lincoln-Mercury, Inc., H. Grossman, and H. I. Grossman,

Defendants.

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4-74 Civ. 477.

COMPLAINT, JURY DEMANDED
(Filed in U.S. District Court October 1, 1974)

I

Jurisdiction, Venue and Parties

1. This complaint is filed and the jurisdiction of this court is invoked under the provisions of Sections 4 and 16 of the Clayton Act, Title 15, United States Code Sections 15 and 26, entitled "An Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies,"

(a) to prevent, restrain and enjoin continuing violations by defendants of Section 1 of the Sherman Act, Title 15, United States Code Section 1, entitled "An Act to Protect

Trade and Commerce Against Unlawful Restraints and Monopolies," and

(b) for damages suffered by plaintiff in its business and property by reason of defendants' violations of Section 1 of the Sherman Act.

2. Plaintiff Quality Mercury, Inc., is a corporation organized and existing under the laws of the State of Delaware with its principal place of business at 1001 Clover Drive, Bloomington, Minnesota.

3. Defendant Ford Motor Company is a corporation organized and existing under the laws of the State of Delaware and may be found in and transacts business in the District of Minnesota.

4. Defendant Ford Marketing Corporation is a corporation organized and existing under the laws of the State of Delaware and may be found in and transacts business in the District of Minnesota.

5. Defendant Prestige Lincoln-Mercury, Inc., is a corporation organized and existing under the laws of the State of Minnesota and may be found in and transacts business in the District of Minnesota.

6. Defendants N. Grossman and H. I. Grossman are individuals residing in the State of Minnesota.

7. Others not made defendants herein have participated as co-conspirators with the defendants in some or all of the offenses charged.

8. Such co-conspirators include, but are not limited to, certain individuals and Gelco, Inc., a corporation organ-



ized and existing under the laws of the State of Minnesota, which may be found in and transacts business in the District of Minnesota.

II

Trade and Commerce Involved

9. Defendant Ford Motor is one of the world's major manufacturers of automobiles. Its various brands and types of automobiles, trucks and other vehicles are marketed through divisions of defendant Ford Marketing. The divisions in turn make the majority of their sales through dealerships. Plaintiff is unaware at this time of the arrangements between Ford Motor and Ford Marketing under which Ford Marketing sells the products of Ford Motor. Defendants Ford Motor and Ford Marketing are involved in interstate commerce.

10. The Lincoln-Mercury division of Ford Marketing markets the Lincoln line of automobiles. This is a high-priced, luxury automobile, competing with Cadillac and Chrysler Imperial. The division also markets the Mercury line of automobiles which includes various types of automobiles ranging from those of standard sizes and prices through intermediates, compacts, sub-compacts, imports and sports cars.

11. The Lincoln and Mercury lines of automobiles together offer virtually every type and price level of automobiles manufactured and marketed in the United States by American manufacturers. The lines complement each other; and having each line available significantly enhances the operation of a dealership by making possible a larger vol-

ume of business, economies of operation, and better service to the public. Because of this, it is established policy of Ford Motor and Ford Marketing that both the Lincoln and Mercury lines be handled by the supervised dealers of the Lincoln-Mercury division, although separate sales agreements are written with dealers for each line of automobile; and of the approximately 1100 supervised dealers of the Lincoln-Mercury division, only a handful are not appointed to sell and service both lines of automobiles.

12. One of the handful is plaintiff Quality Mercury. It has operated at 1001 Clover Drive since January 2, 1968. Quality Mercury sells and has leased the Mercury line of automobiles, sells used automobiles, a foreign-made automobile, and parts and accessories, and provides repairs and other services for customers. The "dealer's locality" of Quality Mercury is the "Minneapolis market" which covers Hennepin County and some additional areas. Its primary market area is south Minneapolis, part of southwest Minneapolis, the south Minneapolis suburbs and part of the southwest Minneapolis suburbs. Under Quality Mercury's sales agreement with the Lincoln-Mercury division, the division may appoint a Mercury dealer with a place of business more than 10 miles from Quality Mercury's place of business; and it is the policy of the Lincoln-Mercury division to appoint additional dealers for the Lincoln or Mercury lines at its discretion if the location of the newly-appointed dealer is 10 miles or more from any existing dealer selling the line of automobile to be sold by the new dealer.

13. Defendant Prestige Lincoln-Mercury operates a



Lincoln-Mercury dealership at 6661 Wayzata Boulevard in St. Louis Park, Minnesota. It sells and leases the entire Lincoln-Mercury line of automobiles, sells used automobiles, parts and accessories, and provides repair and other services for customers. The "dealer's locality" of Prestige Lincoln-Mercury is the "Minneapolis market." Its primary market area is west Minneapolis and part of southwest Minneapolis, the west Minneapolis suburbs and part of the southwest Minneapolis suburbs, and in addition for its Lincoln line north Minneapolis and the north and northeast Minneapolis suburbs. Prestige Lincoln-Mercury began operating a Lincoln-Mercury dealership in 1962. Its location is more than 10 miles from the location of Quality Mercury. It is involved in interstate commerce.

14. Defendants N. Grossman and H. I. Grossman are officers, directors and shareholders of Prestige Lincoln-Mercury and Gelco and directly and effectively control the operations of both corporations.

## III

## Offenses Charged

15. Commencing in 1962, and up to and including the date of filing this complaint, the defendants have engaged in an unlawful combination and conspiracy to restrain interstate trade and commerce in violation of Section 1 of the Sherman Act.

16. The combination and conspiracy has consisted of a continuing agreement and concert of action to keep Prestige Lincoln-Mercury as the sole Lincoln dealership in the

Minneapolis market in order to reduce and elinninate and prevent competition in the aforesaid interstate trade and commerce.

17. The combination and conspiracy to restrain trade has been effectuated by various means and methods, including but not limited to the following:

a) granting Prestige Lincoln-Mercury the only Lincoln dealership in the Minneapolis market notwithstanding determinations by Ford Motor or Ford Marketing, or both, and Prestige Lincoln-Mercury and defendants N. Grossman and H. I. Grossman that another Lincoln dealership is necessary and desirable in the Minneapolis market, at or near the location of Quality Mercury; and allowing Prestige Lincoln-Mercury the right, in its sole discretion, to determine if the Minneapolis market will be serviced only by its Lincoln dealership.

b) restricting Quality Mercury to selling only the Mercury line of automobiles notwithstanding the policy of the Lincoln-Mercury division that its supervised dealers should sell both Lincolns and Mercurys to enhance the performance and competitive ability of its dealers and to provide diversified products and necessary services to the market.

c) holding out to Quality Mercury that a letter by a district sales manager of Lincoln-Mercury in 1962 to defendants N. and H. I. Grossman is a binding obligation, that it supercedes the policies and rights of defendants Ford Motor and Ford Marketing to authorize additional Lincoln dealers more than 10 miles from an existing Lincoln dealer, that it supercedes the policies and rights of defendants Ford Motor and Ford Marketing to have Lincoln-Mercury dealers sell both Lincolns and Mercurys, and that it prevents the establishment of a Lincoln dealership in an area determined to need such a dealership.



d) granting Prestige Lincoln-Mercury an exclusive dealership in a market which it does not and cannot adequately service with no purpose other than to insulate Prestige Lincoln-Mercury from competition from other Lincoln dealers.

But for the combination and conspiracy, the Lincoln-Mercury division would have entered into a sales agreement with Quality Mercury for Quality Mercury to sell the Lincoln line of automobiles.

## IV

## Injury to Plaintiff and the Public

18. By reason of the unlawful conduct of defendants alleged above, Quality Mercury has been injured in that:

a) It has lost and will continue to lose profits from sales, leases and other business it would have had in the absence of the violations.

b) It has suffered and will continue to suffer substantial injury to its goodwill.

c) It has been damaged and will continue to be damaged in other respects in its business and property.

19. By reason of the unlawful conduct of defendants alleged above, the public has been and will continue to be injured by being deprived of a needed Lincoln outlet for

sales, leasing and service in a large and significant trade area and the benefits of competition that would result from such an outlet.

Wherefore, plaintiff Quality Mercury prays:

1. Judgment that defendants have combined and conspired to restrain interstate trade and commerce as described herein in violation of Section 1 of the Sherman Act.

2. Judgment that defendant Ford Motor or Ford Marketing, or both, enter into a standard Lincoln dealership agreement with plaintiff so that plaintiff can sell the Lincoln line of automobiles and related parts and services from plaintiff's place of business.

3. Judgment for its damages against each defendant and all of them in an amount to be determined at trial and that, in accordance with law, this amount be trebled. The amount of plaintiff's damages cannot be determined at this time but plaintiff believes it to be a large sum of money.

4. That plaintiff recover from defendants and each of them the costs of this suit, including reasonable attorney's fees, as provided by Section 4 of the Clayton Act.

5. That plaintiff be granted such other, further and different relief as the court may deem just and proper.

Plaintiff demands trial by jury.

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